

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THOMAS A. VOGELE et al.,

Plaintiffs and Respondents,

v.

RICHARD D. WILLIAMS et al.,

Defendants and Appellants.

G055142

(Consol. with G055144)

(Super. Ct. No. 30-2012-00558522)

O P I N I O N

Appeals from a judgment of the Superior Court of Orange County, Hugh Michael Brenner, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed.

Nemecek & Cole, Frank W. Nemecek and Lucy H. Mekhael for Defendants and Appellants Richard D. Williams and Kelly Lytton & Williams LLP.

Palmieri, Tyler, Wiener, Wilhelm & Waldron, Charles H. Kanter and Erin K. Oyama for Defendant and Appellant Susan D. Lintz.

Jeffrey Lewis for Plaintiff and Respondent.

* * *

INTRODUCTION

Attorney Thomas A. Vogele and his law firm, Gimino Vogele Associates, LLP (collectively Vogele) sued Susan D. Lintz and attorney Richard D. Williams for malicious prosecution. Williams, representing Susan,¹ had filed two lawsuits against Vogele (among others) in connection with a dispute over the ownership of a company originally formed by Susan's father. Those lawsuits were terminated on their merits in Vogele's favor. Following a bench trial, the trial court found that Susan and Williams lacked probable cause to file those lawsuits; a jury found they acted with malice, and awarded damages to Vogele. On appeal, Susan and Williams challenge only the trial court's finding of a lack of probable cause.

We conclude there was not substantial evidence to support the trial court's finding that Susan and Williams lacked probable cause to file the lawsuits. Therefore, we reverse the judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I.

THE PARTIES

Robert H. Lintz, now deceased, was the father of Susan and James Lintz. Robert was a wealthy and successful businessman and real estate developer. One entity containing a substantial portion of Robert's wealth was Sterling Homes Corporation (Sterling Homes). As of January 1999, Robert owned 92 percent of Sterling Homes; James and Susan each owned 4 percent.

Susan was previously married to William F. Dohr. After their divorce in 1991, Dohr continued to manage Robert's financial affairs and work for the Lintz family companies.

¹ We will refer to the members of the Lintz family by their first names to avoid confusion; we intend no disrespect.

As part of his estate planning, Robert created a new entity, Riviera Holdings LLC (Riviera Holdings), to acquire Robert's Sterling Homes stock pursuant to an installment sale. Dohr and Dean Duncan (another longtime business associate of Robert's) were the two owners of Riviera Holdings. Riviera Holdings gave Robert a promissory note in the amount of \$15 million. Money from Sterling Homes was intended to pay off the Riviera Holdings note. When Duncan's health declined, his position was liquidated out of Riviera Holdings, leaving Dohr as the sole owner of 92 percent of Riviera Holdings.

II.

*LITIGATION AND OTHER ACTIVITIES BEFORE THE FRAUD CASES WERE FILED*²

In 2009, Robert and his fifth wife, Lynne Lintz, sued Dohr for breach of contract, among other causes of action, based on the failure to pay off the Riviera Holdings' promissory note.

After Robert died in October 2009, Susan and her brother James sued Lynne for elder abuse. Susan and James prevailed in that litigation in June 2011.

In August 2010, a meeting was held at Williams' law office. Williams, Susan, James, Mary Davis (Susan and James's mother), Williams' law partner Sheldon Lytton, and Vogele attended. Vogele prepared a PowerPoint presentation and provided hard copies of that presentation to those in attendance. The PowerPoint explained the history of Robert's estate planning, the status of companies and entities in which the family members had an interest, and the litigation matters involving the family members and the entities. Specifically, the PowerPoint explained how much of the stock of

² Robert Lintz's estate plan and investments spawned substantial litigation involving the parties to this case, as well as many other individuals and entities. At least two of those cases have resulted in lengthy unpublished opinions by this court. (See *Lintz v. Blue Goose Dev., LLC* (Apr. 24, 2015, G048325, G048381, G048382, G048520); *Lintz v. Dohr* (July 18, 2011, G043994).) Here, we discuss only those cases that are directly relevant to the issues presented by this appeal.

Sterling Homes was owned by Dohr. Vogele also explained to those present that in connection with one of Robert's trusts, Robert had executed a letter of wishes providing that if anyone sued Dohr in connection with his management of Sterling Homes, Atavus Investments, LLC (Atavus), or any of Robert's other trusts or investments, that person would be disinherited. Vogele referred to this clause as a poison pill.

In July 2011, Williams sent a letter to the members of Atavus and the shareholders of Sterling Homes. The letter, including exhibits, was 425 pages, and was sometimes referred by the parties as "The Tome." The Tome accused Vogele of wrongful conduct and breaching his professional responsibilities, claimed the PowerPoint presentation at the August 2010 meeting was false and misleading, and recommended that Atavus and Sterling Homes fire Vogele and sue him for fraud and malpractice.

III.

THE UNDERLYING FRAUD CASES

In August 2011, Dohr, represented by Vogele, sued Susan and James for declaratory relief. The complaint sought a declaration that Dohr owned "all legal, beneficial and equitable rights, title and interest" in 69.3 percent of the Sterling Homes stock. (Ultimately, Dohr prevailed on summary judgment and was determined to own the majority of the Sterling Homes shares.)

In September 2011, Susan responded with two lawsuits; the first was a cross-complaint filed by Susan as an individual, the second was a separate shareholders' derivative action. In both, Susan sued Vogele for fraud, fraudulent concealment, professional malpractice, and conspiracy to commit fraud and breach of fiduciary duty. Williams represented Susan in both actions.

Susan alleged Vogele had been retained and had performed legal services for Sterling Homes, Atavus, and another of Dohr's companies called Amberhill Development Ltd. Susan further alleged that Vogele had presented materials to her and others in August 2010 supporting a claim that Dohr had actual ownership of

approximately 68 percent of the Sterling Homes stock, while Vogele knew those materials to be false. Susan also alleged that Vogele violated the California Rules of Professional Conduct and the applicable standards of the legal profession when Vogele learned that Dohr did not have an ownership interest in Sterling Homes but failed to bring this fact to Susan's attention and further failed to withdraw as counsel for Dohr, Sterling Homes, and Atavus.

Vogele filed anti-SLAPP motions against both the cross-complaint and the derivative action. The trial court granted both anti-SLAPP motions. The court found that the litigation privilege of Civil Code section 47, subdivision (b) immunized Vogele from liability: "Susan Lintz'[s] causes of actions against Attorney Vogele and GVA arose from communicative acts made by Attorney GVA Defendants in connection with the representation of their client in litigation and is absolutely protected under the litigation privilege of Civil Code § 47(b)." Susan did not appeal from the orders granting the anti-SLAPP motions.

IV.

THE MALICIOUS PROSECUTION CASE

In April 2012, Vogele sued Susan, Williams, and Williams's law firm for malicious prosecution. Vogele alleged (1) the underlying fraud cases were terminated in Vogele's favor based on the orders granting the anti-SLAPP motions; (2) Susan and Williams lacked probable cause to file and maintain the underlying fraud cases; (3) Susan and Williams filed and maintained the underlying fraud cases with malice; (4) Vogele suffered damage as a result of Susan's and Williams's actions; and (5) Susan's and Williams's intentional acts were taken in callous disregard for Vogele's rights and with the intent to cause extreme economic hardship to Vogele, and thus warranted punitive damages.

Williams and his law firm appeared together. Susan appeared separately, represented by Williams and his law firm, and did not assert advice of counsel as a

defense in her original answer. In response to discovery requests from Vogeles, Susan refused to produce any communications between herself and Williams (as her attorney) on grounds of the attorney-client privilege. During the meet and confer process, Williams's attorney wrote: "At this point, there has been no assertion of the advice of counsel defense and no waiver of the attorney-client privilege between Mr. Williams and his client, Susan." Vogeles therefore did not take Williams's deposition.

In April 2014, Susan filed an amended answer asserting advice of counsel as a defense, and a month later filed a motion for summary judgment based on that defense. The trial court denied Susan's motion: "Plaintiffs present additional facts . . . regarding extensive relevant discovery that Susan refused to produce on the ground that the information was protected by attorney-client privilege, but Susan and Williams refused to provide any privilege logs. . . . Yet now she takes the opposite and contradictory tack and raises the defense of advice of counsel, which shows that the allegedly privileged documents really were relevant and discoverable. So Susan cannot have it both ways, to Plaintiffs' detriment and prejudice."

On the first day of trial, the parties stipulated to bifurcating the issue of probable cause in a bench trial. After a trial covering 11 days, posttrial briefing, and oral argument, the trial court ruled from the bench that Susan, Williams, and Williams's law firm did not have probable cause to bring the underlying fraud cases. A statement of decision was not requested.

In February 2017, a jury trial was conducted on the issues of malice and damages. The jury found that Susan, Williams, and Williams's firm acted primarily for a purpose other than succeeding on the merits of the underlying fraud cases against Vogeles, were actively involved in filing the fraud cases against Vogeles, and were a substantial factor in causing compensatory damages to Vogeles totaling \$182,381.³ The jury also

³ The jury found that no damages were suffered by Vogeles's firm.

found by clear and convincing evidence that Susan and Williams had acted with malice for purposes of punitive damages.

In a third phase of the trial, the jury awarded \$37,500 in punitive damages against Williams to Voge, and \$37,500 in punitive damages against Susan to Voge. Although the jury found that a managing agent of Williams's firm authorized his conduct, no punitive damages were awarded against the firm.

Judgment was entered. Susan and Williams separately filed notices of appeal.

DISCUSSION

I.

PROBABLE CAUSE

A.

Standard of Review and Legal Background

A claim for malicious prosecution requires proof that the prior action was commenced by or at the direction of the defendant, without probable cause. (*Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 871.) Probable cause to bring a civil action exists if the claim is legally tenable, as determined on an objective basis. (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 382.) Whether probable cause exists presents a question of law for the trial court and requires a determination of whether any reasonable attorney would have considered the action legally tenable in light of the facts known to the plaintiff or the plaintiff's lawyer in the underlying action when the lawsuit was filed. (*Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 624; see *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 822, fn. 6.)

Probable cause exists if any reasonable attorney would have considered the action legally tenable. (*Sheldon Appel Co. v. Albert & Olier, supra*, 47 Cal.3d at p. 881.) This is recognized as a "lenient" standard, which reflects "the important public policy of avoiding the chilling of novel or debatable legal claims" and allows attorneys

and litigants “““to present issues that are arguably correct, even if it is extremely unlikely that they will win””” (*Wilson v. Parker, Covert & Chidester, supra*, 28 Cal.4th at p. 817.) Vogele had the burden of proof as to the lack of probable cause. (*Popelka, Allard, McCowan & Jones v. Superior Court* (1980) 107 Cal.App.3d 496, 503.)

On appeal, we review any factual findings for substantial evidence, and we review the trial court’s legal decision regarding probable cause de novo. (*Orange County Water Dist. v. MAG Aerospace Industries, Inc.* (2017) 12 Cal.App.5th 229, 239-240.)

In this case, no statement of decision was requested at phase one of the bench trial. We must therefore apply the doctrine of implied findings, “meaning that we presume the trial court ‘made all factual findings necessary to support the judgment for which substantial evidence exists in the record. In other words, *the necessary findings of ultimate facts will be implied* and the only issue on appeal is *whether the implied findings are supported by substantial evidence.*’” (*LSREF2 Clover Property 4, LLC v. Festival Retail Fund 1, LP* (2016) 3 Cal.App.5th 1067, 1076, italics added.) We infer the implied findings.

In his respondent’s brief, Vogele argues that substantial evidence supports the trial court’s finding regarding lack of probable cause on the issue of the litigation privilege. (Civ. Code, § 47.) Vogele also notes that in the trial court he raised five additional grounds for a finding of lack of probable cause. Because the trial court did not issue a statement of decision, we presume it found against Susan and Williams on these grounds as well, and must consider whether substantial evidence supports those implied findings. Vogele’s respondent’s brief does not provide any citations to evidence or argument regarding his claims that Susan and Williams lacked probable cause, other than citations to the trial court’s ruling regarding the litigation privilege and to Vogele’s closing trial brief.

B.

The Litigation Privilege

Civil Code section 47 provides that all communications made within a judicial proceeding (with exceptions irrelevant here) are privileged. Case law has extended the litigation privilege to communications that are preliminary to a judicial proceeding. (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1194-1195 [discussion of merits of proposed lawsuit with prospective plaintiffs]; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 781-782 [attorney's letter stating intention to file complaint with state Attorney General]; *Lebbos v. State Bar* (1985) 165 Cal.App.3d 656, 668-669 [communications with client-complainants in investigation for state bar disciplinary proceedings]; *Lerette v. Dean Witter Organization, Inc.* (1976) 60 Cal.App.3d 573, 576-578 [privilege covers demand letter]; *Martin v. Kearney* (1975) 51 Cal.App.3d 309, 311 [communication designed to prompt commencement of a proceeding is covered to the same extent as a communication during that proceeding]; *Ascherman v. Natanson* (1972) 23 Cal.App.3d 861, 865 [privilege extends to preliminary conversations between witness and attorney that are in "some way related to or connected with a pending or contemplated action"].)

One of the most recent cases to address when the litigation privilege arises is *Strawn v. Morris, Polich & Purdy, LLP* (2019) 30 Cal.App.5th 1087. In that case, the appellate court concluded that the litigation privilege did not apply even though both parties had retained counsel and all involved anticipated that a civil action would eventually be filed. “[R]espondents cannot gain the protection of the privilege to protect their own communications merely by establishing that they anticipated a potential for litigation,” as “*the privilege only arises at the point in time when litigation is no longer a mere possibility, but has instead ripened into a proposed proceeding that is actually contemplated in good faith and under serious consideration as a means of obtaining access to the courts for the purpose of resolving the dispute.*” [Citations.] That State

Farm had a basis for suspicion of Dennis Strawn did not necessarily preordain the denial of appellants' insurance claim, nor did appellants' retention of counsel necessarily reflect serious contemplation of litigation as opposed to a desire for assistance in a complicated insurance claim process.” (*Id.* at pp. 1096-1097, italics added.)

In granting the anti-SLAPP motions in the underlying fraud cases, the trial court found: “Susan Lintz’[s] causes of actions against Attorney Vogele and GVA arose from communicative acts made by Attorney GVA Defendants in connection with the representation of their client in litigation and [are] absolutely protected under the litigation privilege of Civil Code § 47(b).” (Virtually identical language appears in the order granting the anti-SLAPP motion as to the cross-complaint.) That finding was never challenged on appeal.

After the bench trial in the malicious prosecution case, the trial court found: “[Vogele] was one of Enterprise Counsel Group’s lawyers engaged in this litigation. . . . To my knowledge he never did anything other than participate in various aspects of litigation that were going on, the elder abuse case, the note case, all these cases that were pending.

“Then Susan Lintz started to become suspicious that maybe Mr. Dohr, who was her ex-husband and they had a child together, Peter, who was one of his heirs, was hiding something. I think that’s maybe one of the first things you hear in these emails, . . . ‘Bill is hiding something. I know he’s hiding something. But I don’t know what.’ But they hired Maher, CPA Maher, who started to work on the case.”^[4]

“Then on August 7th of that year the meeting was held in Mr. Williams’ office. I have no difficulty finding that that would be covered by the litigation privilege. That is, there had already been talk about litigation. I don’t think Mr. Vogele went down

⁴ Both the e-mails the court refers to where Lintz believes Dohr was hiding something and the hiring of Maher to investigate postdate the August 2010 meeting.

there with his Power Point presentation and it was all just a friendly meeting. I think at that point—the evidence makes it clear that at that point there was serious consideration of litigation, so that he was covered by the privilege.”

During the malicious prosecution trial, hard copies of the PowerPoint presentation were admitted in evidence; the presentation showed the various relationships between the companies and investments that formed Robert’s estate. Both Susan and Williams testified that the meeting was cordial, and that they had no thought of suing either Dohr or Vogele at the time of this meeting.

Vogele testified that he believed Susan was prepared as of the time of that meeting to immediately sue Dohr; however, when Vogele explained that Robert had set up his estate plan with a “poison pill” that would immediately disinherit any beneficiary who sued Dohr, the mood of the meeting changed. Vogele testified that Sheldon Lytton, counsel for Susan who was present at the meeting, had a document on pleading paper placed upside down on the conference table. When Vogele mentioned the poison pill, Lytton slid the document off the table and onto his lap. Vogele assumed that the document was a pleading against Dohr.

Lytton, however, testified that he was “absolutely certain” he did not have a draft complaint against Dohr at the August 2010 meeting: “[A]t that point in time there was no reason to have been thinking in terms of a draft complaint. We were meeting—I think that was our first big meeting with Mr. Vogele, who did a presentation of all the various entities and how they linked up, and Susan’s interests. [¶] So there was absolutely, in my mind at that time, no reason to be thinking about a lawsuit against Bill Dohr.”

Substantial evidence does not support the trial court’s finding that the statements and actions at the August 2010 meeting were protected by the litigation privilege. Although a number of litigation matters were pending in which one or more of the parties to the malicious prosecution case was a party or counsel of record, there was

no litigation pending in which these parties were opposed to each other. Nor was such litigation threatened. Even if Vogeles and Dohr ““anticipated a potential for litigation”” involving Susan and Williams, it was still only “““a mere possibility””” and had not “““ripened into a *proposed proceeding* that is actually contemplated in good faith and under serious consideration as a means of obtaining access to the courts for the purpose of resolving [a] dispute.””” (*Strawn v. Morris, Polich & Purdy, LLP, supra*, 30 Cal.App.5th at p. 1097.)

C.

Lack of Standing – Lack of Attorney-Client Relationship

In his malicious prosecution complaint, Vogeles also alleged that Susan lacked probable cause to sue him for malpractice, either individually or on behalf of Atavus in the derivative action, because Vogeles had never had an attorney-client relationship with either Susan or Atavus. The trial court did not specifically address this argument in its ruling that Susan and Williams lacked probable cause when filing the underlying fraud cases; under the doctrine of implied findings, however, we must determine whether substantial evidence supports the trial court’s implied finding that there was no such relationship.

Vogeles testified that he had never represented Susan or Atavus.

Susan argues that standing to bring a legal malpractice claim may arise from either an attorney-client relationship or an “other basis for duty.” (*Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518, 1528.) Susan fails, however, to show any other basis for imposition of such a duty on Vogeles, vis-à-vis Susan. Susan points to the fact that she owns an interest in Sterling Homes, and Vogeles represented Sterling Homes and Dohr in another litigation matter. Ownership in a company does not create an attorney-client relationship with the attorney for the company. (See *Koo v. Rubio’s Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 732-733.)

Susan cites the following testimony to establish Vogeles had an attorney-client relationship with Atavus: Vogeles provided financial records of Atavus to Susan's attorney; Vogeles proposed a meeting with Susan to discuss Atavus; Vogeles requested of Susan's lawyers that Susan extend the due date on a promissory note owed by Atavus to Susan; Vogeles made written proposals on behalf of Atavus to Susan's lawyers regarding a renegotiation of payments due from Atavus to Susan; Vogeles provided the PowerPoint presentation which addressed Atavus.

Further, Sheldon Lytton testified that he understood that Vogeles was representing Atavus, based on the communications between Vogeles and Lytton regarding Atavus's intentions regarding the promissory note due to Susan. The letters exchanged between Lytton and Vogeles are consistent with this understanding. While Vogeles does not state in those letters that he is counsel for Atavus, his statements about what Atavus can do in terms of payment, and what he is requesting of Susan's counsel objectively justify a presumption of Vogeles's representation of Atavus.

This issue is not whether Vogeles was counsel for Atavus, but whether Susan and Williams reasonably believed he was counsel for Atavus. The evidence does not support a finding that it was objectively unreasonable for Susan and Williams to believe that Vogeles was counsel for Atavus.

D.

Improper to Sue to Trigger Malpractice Insurance

There was ample evidence at trial that Susan and Williams sued Vogeles to trigger his professional malpractice insurance policy. But unless that was the only reason Susan and Williams sued Vogeles, it is not sufficient to support a finding that the malpractice claim was not legally tenable.

Vogeles cites *Videotape Plus, Inc. v. Lyons* (2001) 89 Cal.App.4th 156. That case, however, involved a trial court order granting judgment on the pleadings in a malicious prosecution case. The appellate court reversed because the plaintiffs had

“adequately alleged [defendants] did not have probable cause for either cause of action because [defendants] asserted negligence solely to trigger insurance coverage and raised fraud without knowing of any misrepresentation or duty to disclose.” (*Id.* at p. 162.) In the present case, Vogeles did not allege that Susan and Williams sued him for malpractice *solely* to trigger his insurance coverage, nor was there substantial evidence at trial to support such a finding if one had been made by the trial court.

E.

Judicial Admissions of Fact in Elder Abuse Case

Vogeles also argues that Susan and Williams did not have probable cause to file the underlying fraud cases based on statements Susan made in support of Dohr in separate litigation against Lynne in the elder abuse case in Monterey. Vogeles argued in his closing trial brief in the malicious prosecution case: “In light of Susan’s binding judicial admissions of fact made in May 2011 in the Monterey proceedings concerning Dohr, no reasonable attorney would have argued the exact opposite and sued Dohr and Vogeles in September 2011.”

The alleged binding judicial admissions were made in the closing trial brief filed in the elder abuse case by Susan and her brother James against Robert’s fifth wife, Lynne. These alleged admissions included, among others, statements that Lynne’s allegations that Dohr stole from Sterling Homes had never been proven, and the transfer of Riviera to Duncan and Dohr was a proper, well thought out investment and estate planning strategy.

The statements cited by Vogeles do not support a finding that Susan and Williams lacked probable cause to sue Vogeles for several reasons. First, they are statements about Dohr, and not Vogeles. Second, the context of these statements in the closing trial brief filed in the elder abuse case makes clear that Lynne’s allegations against Dohr were irrelevant and immaterial to that case. Third, the statements do not constitute judicial admissions about Dohr (much less Vogeles). They merely state that

Lynne had failed to prove the truth of her allegations against Dohr, not that Dohr had never done anything wrong. And finally, even if Susan and Williams believed in May 2011 that Dohr had done nothing wrong, that does not mean they could not have learned something to change that opinion before the underlying fraud cases were filed later that year.

F.

Bob Williams' Deposition Testimony

In his closing trial brief in the present case, Vogeles argued that the deposition of Bob Williams, taken in a separate matter, did not provide probable cause for Susan and Williams to sue Vogeles. (Bob Williams, who is no relation to Richard Williams, is a certified public accountant who assisted Robert Lintz set up the tax planning transactions involving Sterling Homes.) The deposition was attached as an exhibit to Dohr's motion for leave to file a first amended cross-complaint in the lawsuit filed by Robert and Lynne against Dohr (in which Dohr was represented by Vogeles).

To the extent we can discern, Susan was not herself a party to that case, and Richard Williams was neither a party nor counsel of record to any party in that case. Further, although Vogeles argues that Richard Williams' trial counsel read extensively from Bob Williams' deposition at the malicious prosecution trial, nothing in the record shows that Susan and Richard Williams were privy to the contents of the deposition before the underlying fraud cases were filed. (Neither Richard Williams nor Susan was present for the deposition itself, and the record does not contain a proof of service for the motion for leave to amend that might indicate whether Susan or Richard Williams received a contemporaneous copy of it.) It is entirely possible that Susan and Richard Williams did have a copy of this deposition before filing the underlying fraud cases, but this allegation has not been established.

G.

May Legal Malpractice Be Alleged in a Corporate Derivative Action?

Vogele also argues that Susan and Williams lacked probable cause to initiate a malpractice action against him because such a cause of action was absolutely barred by law. In *McDermott, Will & Emery v. Superior Court* (2000) 83 Cal.App.4th 378 (*McDermott, Will*), the court held: “[A] derivative lawsuit for malpractice against corporate outside counsel raises unique attorney-client privilege issues. Because the shareholders are not the holder of the privilege, they do not effect a waiver of that privilege merely by filing their action on the corporation’s behalf. As a result, in the absence of a waiver by the corporate client, the third party attorney is effectively foreclosed from mounting any meaningful defense to the shareholder derivative action. Accordingly, . . . we hold such a derivative action against the corporation’s outside counsel, necessarily brought in equity, cannot proceed.” (*Id.* at p. 381.)

The court in *Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189 (*Favila*), created an exception to the *McDermott, Will* rule when the trial court is ruling on a demurrer and there is a possibility that the attorney-client privilege does not apply or will be waived: “The practical problem confronting a corporation’s outside counsel named as a defendant in a derivative action that led to our decision in *McDermott, Will*, of course, is eliminated if the lawyer-client privilege has been waived by the privilege holder or otherwise no longer exists.” (*Id.* at p. 218.) The *Favila* court explained that, under the particular circumstances of the case, the appropriate resolution was to conditionally stay the case against outside counsel until the issues of waiver of privilege and the crime-fraud exception to privilege had been resolved, or the case against the other defendants had terminated. (*Id.* at pp. 220-222.)

Williams contends that the claim for professional malpractice against Vogele in the derivative action was not absolutely barred by *McDermott, Will* and that

the *Favila* opinion created “an objectively reasonable basis to assert derivative claims by Susan against the Vogeles Parties on behalf of Sterling and Atavus.”

Williams also argues there was probable cause to determine Susan had standing to bring the lawsuit because of the holding of *Blue Water Sunset, LLC v. Markowitz* (2011) 192 Cal.App.4th 477. The limited nature of that holding, however, is set forth in the very first paragraph of the opinion: “[W]e announce a limited exception to the rule that a complaining party lacks standing to seek disqualification of an attorney unless the party and attorney have some sort of attorney-client or fiduciary relationship. If an attorney simultaneously represents a limited liability company and a member with conflicting interests in a derivative action filed by the second and only other member, and if the limited liability company’s consent to concurrent representation is required by California State Bar Rules of Professional Conduct, rule 3-310, the second member has vicarious standing to move to disqualify. Vicarious standing is based on the limited liability company’s standing under existing case law and the second member’s unilateral right under rule 3-600 to decide for the limited liability company whether to waive the conflict of interest.” (*Id.* at p. 481, fn. omitted.)

The cross-complaint was filed in September 2011, at a time when the law was at least “debatable.” *Favila* was a relatively new case and the exceptions to the analysis in *McDermott, Will* had not been fully developed. We cannot conclude that, on this record, the law was so clear on the relevant point as to be undebatable.

II.

ADVICE OF COUNSEL DEFENSE

Even if lack of probable cause had been proven as to Susan, we would nevertheless reverse the judgment as to Susan because she was protected from Vogeles’ malicious prosecution action by the advice of counsel defense.

Susan argues that she was entitled to and did rely on the advice of counsel. “Good faith reliance on the advice of counsel, after truthful disclosure of all the relevant

facts, is a complete defense to a malicious prosecution claim.” (*Bisno v. Douglas Emmett Realty Fund* 1988 (2009) 174 Cal.App.4th 1534, 1544; see *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 53-54.) The burden of proving the advice of counsel defense was on Susan. (*Nunez v. Pennisi* (2015) 241 Cal.App.4th 861, 877.)

Advice of counsel was decided by the trial court as a part of phase one of the trial. On that defense, the court found: “And to the extent that Ms. Susan Lintz has asserted [the advice of counsel] defense, it’s denied. She has not met her burden in that regard. And I think the evidence will show that it was her suspicions that started this case. [¶] She and Mr. Williams were—I don’t remember the sequence, but they were dating or engaged or married at that time, and working together on this. To say that somehow Susan Lintz was some passive person who just relied on the advice of counsel, I think the evidence points in the opposite direction.”

Susan is not an attorney and has no legal training. Susan testified she provided her attorneys with all facts in her possession, and did not withhold anything from them. Susan further testified she did not decide whom to sue or what causes of action to allege in the complaint and cross-complaint in the fraud actions; to the contrary, Susan relied on what Williams told her. Susan believed her reliance on Williams’s advice as to the fraud cases was reasonable, because that advice was supported by the forensic accounting work of Tim Maher. Susan also believed her reliance on Williams’s advice was reasonable because her family had a long history of being represented by him, and because she herself was in a relationship with him.

Williams testified that he drafted the shareholders’ derivative action and the cross-complaint in Dohr’s declaratory relief action after conducting legal research that found support for each of the claims asserted. Williams testified he never told Susan anything about the potential effect of the litigation privilege or about the possibility of Vogeles filing an anti-SLAPP motion. He did not ask Susan about any specific claims or defendants; he only asked her whether she wanted to pursue litigation or not.

During closing argument in phase one of the trial, Susan's counsel argued that Voge's counsel had offered no evidence to refute Susan's evidence regarding the advice of counsel defense; Voge's counsel never challenged that assertion.

Voge does not point to any evidence in the appellate record supporting the trial court's finding regarding the advice of counsel defense. Rather, Voge argues that Susan was barred from even raising the defense because she failed to disclose otherwise privileged communications with her attorney during discovery.

Susan initially did not raise advice of counsel as a defense, and asserted the attorney-client privilege in her discovery responses. Susan later amended her answer to raise the defense, but did not amend any of her discovery responses.

The responding party does not have a duty to amend or update his or her discovery responses, though of course the failure to do so may be used to impeach him or her. (*Biles v. Exxon Mobil Corp.* (2004) 124 Cal.App.4th 1315, 1328, fn. omitted; see generally Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2004) ¶ 8:1119, p. 8F (rev. # 1, 2000) ['The responding party need only provide such information as is available at the time the answers are prepared. There is *no* duty to update or amend the answers, either to correct errors or to include new information discovered later. [Citation.]' (Italics in original.)].)

The Civil Discovery Act permits a party requesting discovery by interrogatory or request for production to propound supplemental demands before and after the initial trial setting date, and further gives the trial court discretion to permit additional supplemental demands for good cause. (Code Civ. Proc., §§ 2030.070, 2031.050.) The appellate record does not show that Voge served requests for supplemental discovery responses on Susan, filed any type of motion to compel further discovery responses from Susan, or requested any type of discovery sanction (such as evidentiary or issue preclusion) against Susan. A declaration of Voge's counsel filed in opposition to Susan's motion for summary judgment based on the advice of counsel

defense sets forth in detail counsel's informal attempts at getting Susan to supplement her discovery responses, but does not mention any attempts at obtaining a court order.

The trial court's finding that Susan had failed to establish the advice of counsel defense is not supported by substantial evidence. Therefore, we conclude the defense does apply to Susan, and we reverse the judgment entered against her on that ground too.

DISPOSITION

The judgment is reversed. In the interests of justice, no party shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.